Supreme Court, U.S.
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No. 91-252

In The

Supreme Court of the United States

October Term, 1991

JOSEPH A. LONGO,

Petitioner,

vs.

DON GLIME D/B/A PERRI AUTO SALES, MIDWEST AUTO AUCTION AND SERVICE, INC., JAMES KERNEN, ALVIN MICHEL AND MARTIN WALDMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

- AND APPENDICES -

BODMAN, LONGLEY & DAHLING
By: JAMES J. WALSH
Counsel of Record
100 Renaissance Center, 34th Floor
Detroit, Michigan 48243
(313) 259-7777

Attorneys for Midwest Auto Auction and Service, Inc., Alvin Michel and James Kernen

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I.

WHERE PETITIONER'S CLAIMS PRESENTED NO UNSETTLED QUESTIONS OF STATE LAW, BUT WERE REJECTED BY THE DISTRICT COURT WHEN PLAINTIFF COULD COME FORWARD WITH NO EVIDENTIARY SUPPORT, DOES THE COURT OF APPEALS' EXPRESSION OF DEFERENCE TOWARDS THE DISTRICT COURT'S RULINGS CONFLICT WITH THE HOLDING IN *SALVE REGINA COLLEGE* v. *RUSSELL*, ___ U.S. ___, 111 S. CT. 1217 (1991)?

II.

SHOULD THIS COURT GRANT THE WRIT SOUGHT BY PETITIONER TO CONSIDER ISSUES WHICH LACK JURISPRUDENTIAL SIGNIFICANCE AND WHICH WERE NEITHER RAISED BY PETITIONER IN THE DISTRICT COURT NOR SUPPORTABLE BY THE FACTUAL RECORD?

III.

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DECISION THAT A PUBLIC AUTOMOBILE AUCTION WHICH NEVER HELD TITLE TO THE VEHICLE PLAINTIFF PURCHASED AND DID NOT SIGN THE ODOMETER STATEMENT PLAINTIFF RECEIVED WAS NOT THE TRANSFEROR OF THE VEHICLE SUBJECT TO THE DISCLOSURE REQUIREMENTS OF FEDERAL OR STATE ODOMETER LAWS?

IV.

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT WHEN PLAINTIFF COULD PRODUCE NO EVIDENCE TO SUPPORT HIS PENDENT STATE LAW CLAIMS OF NEGLIGENCE, FRAUD AND VIOLATION OF THE CONSUMER PROTECTION ACT AGAINST A PUBLIC AUTOMOBILE AUCTION THROUGH

WHICH A LICENSED AUTOMOBILE DEALER SOLD A VEHICLE TO PLAINTIFF?

V.

WHETHER THIS COURT SHOULD CONSIDER PLAINTIFF'S CHALLENGE TO A MAGISTRATE'S IMPOSITION OF NOMINAL SANCTIONS AGAINST PLAINTIFF FOR ABUSIVE AND UNREASONABLE DISCOVERY, WHEN THE DISTRICT COURT PROPERLY REJECTED AS UNTIMELY PLAINTIFF'S APPEAL FROM THE MAGISTRATE'S ORDER?

PARTIES

The caption of the case in this Court contains the names of all the parties.

TABLE OF CONTENTS

PAGE

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

COUNTERSTATEMENT OF THE CASE 9

REASONS FOR DENYING THE WRIT 9

CONCLUSION 14

APPENDICES:

Appendix A – Memorandum Opinion and Order November 23, 1988 ..... A-1

Appendix B – Memorandum Opinion and Order January 27, 1989 ..... B-1

Appendix C – Memorandum Opinion and Order June 21, 1987 ..... C-1

TABLE OF AUTHORITIES

PAGE

Cases:

Salve Regina College v. *Russell*, ___ U.S. ___, 111 S. Ct. 1217 (1991) 9, 10

Thomas v. *Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985) 14

Statutes

Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1982(5), 1988, 1989 2-3

Michigan Vehicle Code, M.C.L. § 257.37; § 257.233a 3-5

Michigan Consumer Protection Act, M.C.L. § 445.903 5-9

Rules

F. R. Civ. P. 9(b) 12

F. R. Civ. P. 26(g) 13

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OPINIONS BELOW

Memorandum Opinion and Order, dated November 23, 1988, is found in the Appendix, at pp. A-1-A-20.

Memorandum Opinion and Order, dated January 27, 1989, is found in the Appendix, at pp. B-1-B-12.

Memorandum Opinion and Order, dated June 21, 1989, is found in the Appendix, at pp. C-1-C-9.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit affirming certain judgments and orders of the district court was filed March 12, 1991. The order of the –

Court of Appeals denying a petition for rehearing en banc was filed May 8, 1991. Petitioner has not identified the basis for the invocation of this Court's jurisdiction.

STATUTES INVOLVED

15 U.S.C. § 1982

As used in this subchapter —

* * *

(5) The term "transfer" means to change ownership by purchase, gift, or any other means.

15 U.S.C. § 1988

(a) Not later than 90 days after October 20, 1972, the Secretary shall prescribe rules requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle:

(1) Disclosure of the cumulative mileage registered on the odometer.

(2) Disclosure that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually traveled.

Such rules shall prescribe the manner in which information shall be disclosed under this section and in which such information shall be retained.

(b) No transferor shall violate any rule prescribed under this section or give a false statement to a transferee in making any disclosure required by such rule.

(c) No transferee who, for purposes of resale, acquires ownership of a motor vehicle shall accept any

written disclosure required by any rule prescribed under this section if such disclosure is incomplete.

15 U.S.C. § 1989

(a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of —

(1) three times the amount of actual damages sustained or $1,500, whichever is the greater; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

(b) An action to enforce any liability created under subsection (a) of this section, may be brought in a United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises.

Michigan Compiled Laws § 257.37

"Owner" means any of the following:

(a) Any person, firm, association, or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days.

(b) Except as otherwise provided in section 401a, a person who holds the legal title of a vehicle.

(c) A person who has the immediate right of possession of a vehicle under an installment sale contract.

Michigan Compiled Laws § 257.233a

(1) When the owner or assignor of a registered vehicle transfers or assigns his title or interest in that

vehicle, then the transferor or assignor shall furnish to the transferee or assignee a written statement signed by the transferor or assignor containing the following information:

(a) The odometer reading at the time of transfer or assignment.

(b) The date of transfer or assignment.

(c) The transferor's or assignor's name and current address.

(d) The identity of the vehicle, including its make, model, body style, and vehicle identification number.

(e) A statement that the actual mileage is unknown if the odometer reading differs from the number of miles the vehicle has actually traveled.

(2) A statement shall not be required for:

(a) Vehicles having a gross vehicle weight rating of more than 16,000 pounds.

(b) A vehicle that is not self-propelled.

(c) A vehicle that is 25 years old, or older.

(d) A transfer of a new vehicle from a manufacturer to a dealer.

(3) A person who violates subsection (1) or who in the course of offering, dealing or disposing of any new or used motor vehicle subject to the provisions of subsection (1) alters the mileage reading of an odometer shall be fined not more than $100.00 or imprisoned not more than 90 days.

(4) A violation of subsection (1) by any dealer licensed under this act is prima facie evidence of a fraudulent act as defined in section 249.

(5) A person who, with intent to defraud, violates any requirement under subsection (1), or who alters the mileage on an odometer of a vehicle subject to subsection (1), is liable in an amount equal to the sum of 3 times the amount of actual damages sustained or $1,500.00 whichever is greater, and in the case of a successful recovery of damages, the costs of the action together with reasonable attorney's fees. An action shall be commenced within 2 years from the date on which liability arises.

Michigan Compiled Laws § 445.903

Sec. 3. (1) Unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful and are defined as follows:

(a) Causing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

(b) Using deceptive representations or deceptive designations of geographic origin in connection with goods or services.

(c) Representing that goods or services have sponsorship, approval, chacteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has sponsorship, approval, status, affiliation, or connection which he does not have.

(d) Representing that goods are new if they are deteriorated, altered, reconditioned, used, or secondhand.

(e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

(f) Disparaging the goods, services, business, or reputation of another by false or misleading representation of fact.

(g) Advertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented.

(h) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity in immediate conjunction with the advertised goods or services.

(i) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of, price reductions.

(j) Representing that a part, replacement, or repair service is needed when it is not.

(k) Representing to a party to whom goods or services are supplied that the goods or services are being supplied in response to a request made by or on behalf of the party, when they are not.

(l) Misrepresenting that because of some defect in a consumer's home the health, safety, or lives of the consumer or his family are in danger if the product or services are not purchased, when in fact the defect does not exist or the product or services would not remove the danger.

(m) Causing a probability of confusion or of misunderstanding with respect to the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction.

(n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

(o) Causing a probability of confusion or of misunderstanding as to the terms or conditions of credit if credit is extended in a transaction.

(p) Disclaiming or limiting the implied warranty of merchantability and fitness for use, unless a disclaimer is clearly and conspicuously disclosed.

(q) Representing or implying that the subject of a consumer transaction will be provided promptly, or at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided.

(r) Representing that a consumer will receive goods or services "free", "without charge", or words of similar import without clearly and conspicuously disclosing with equal prominence in immediate conjunction with the use of those words the conditions, terms, or prerequisites to the use or retention of the goods or services advertised.

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

(t) Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.

(u) Failing, in a consumer transaction which is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, to promptly restore to the person or persons entitled thereto any deposit, down payment, or other payment, or in the case of property traded in but not available, the greater of the agreed value or the fair market value of the property, or to cancel within a specified time or an otherwise reasonable time an acquired security interest.

(v) Taking or arranging for the consumer to sign an acknowledgement, certificate, or other writing affirming acceptance, delivery, compliance with a requirement of law, or other performance, if the merchant knows or has reason to know that the statement is not true.

(w) Representing that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a transaction, if the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(x) Taking advantage of the consumer's inability reasonably to protect his interests by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the transaction who knows or reasonably should know of the consumer's inability.

(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.

(z) Charging the consumer a price which is grossly in excess of the price at which similar property or services are sold.

(aa) Causing coercion and duress as the result of the time and nature of a sales presentation.

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

(cc) Failing to reveal facts which are material to the transaction in light of representations of fact made in a positive manner.

(2) The attorney general may promulgate rules to implement this act pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws. The rules shall not create any additional unfair trade practices not already enumerated by this section.

COUNTERSTATEMENT OF THE CASE

The November 23, 1988 Memorandum Opinion and Order of the district court granting summary judgment to Respondents, found in the appendix at A-1, describes this case and is incorporated by reference.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' OPINION IS NOT IN CONFLICT WITH THE HOLDING IN *SALVE REGINA COLLEGE* v. *RUSSELL*, ___ U.S. ___, 111 S. CT. 1217 (1991).

In *Salve Regina College* v. *Russell*, ___ U.S. ___, 111 S. Ct. 1217 (1991), this Court held that a court of appeals should not defer to a district court's determination of state law but should review such determinations *de novo*. In *Salve Regina*, the district court had concluded with scant analysis that Rhode Island courts would apply the substantial-performance doctrine to a contract for a college education, although the appellate courts of Rhode Island had limited the doctrine to construction contracts. The court of appeals, although recognizing the issue as one of first impression, simply deferred to the district court's determination of state law. This Court held that deference to the district court's "feel" for state law was improper: "Independent

review, however, does not admit of unreflective reliance on a lower court's inarticuable intuitions." 111 S. Ct. at 1222.

Salve Regina did not condemn every instance of appellate court deference to district court decisions. To the contrary, it identified several instances where such deference is wholly appropriate:

> "Finally, we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine. *Miller* v. *Fenton*, 474 U.S. 104, 114, 106 S. Ct. 445, 451, 88 L. Ed.2d 405 (1985);" *Id.*

In disposing of Petitioner's claims, the district court did not venture into unchartered areas of state law. Rather, it applied well-established state court precedents and determined that Petitioner could not produce evidence to warrant a trial on his state law claims. The expressed deference to that determination is not at odds with the holding in *Salve Regina*.

II.

THE SUBSTANTIVE ISSUES PETITIONER PRESENTS IN HIS PETITION WERE NOT PROPERLY RAISED IN THE DISTRICT COURT AND, MOREOVER, CANNOT BE SUPPORTED BY THE FACTUAL RECORD DEVELOPED IN THIS CASE.

Petitioner faults the Court of Appeals for not conducting a *de novo* review of the district court's decision that an undisclosed agent cannot be liable under the Federal Odometer Act. But Petitioner's complaint did not assert, nor can it properly be construed to have asserted, a claim that Midwest should be liable for

Glime's allegedly false odometer statement because it was Glime's "undisclosed agent." Petitioner, unfortunately, never clarifies what his phrase "undisclosed agent" means nor does he point to any aspect of Midwest's relationship with the seller that was undisclosed. Whatever the phrase means, it is abundantly clear from the record that Petitioner never properly raised this theory in the district court. Petitioner's original complaint clearly states he knew Glime was the owner of the Porsche and was relying upon Glime's representations about the vehicle when he bid at the auction. As the district court observed in its opinion, the various documents Petitioner received, including the odometer statement, "uniformly show that Donald Glime, doing business as Perri Auto Sales, was the owner and seller of the automobile." (Appendix, p. A-2). The form bill of sale that Glime signed and gave Petitioner expressly stated that Midwest acts solely as the agent for the seller. In light of these undisputed facts, Petitioner's recent theory that Midwest could be liable because it was the "undisclosed agent" for the seller is absurd. Indeed, it is so absurd and so at odds with the factual record that Petitioner did not put the theory before the district court. The court of appeals could not give undue deference to a non-existent district court ruling.

Similarly, Petitioner's theory that Midwest could be deemed the "transferor" of the Porsche he bought from Glime because it had sufficient indicia of ownership was not presented to or considered by the district court. Again, the factual record permits only the conclusion that Petitioner, himself a practicing attorney, knew that Glime was the owner of the Porsche. Nothing in the record supports Petitioner's theory, first offered on appeal, that he was somehow misled into a belief that Midwest was auctioning a vehicle it owned. In any event, it is undisputed that Glime, not Midwest, signed

the allegedly false odometer statement and for that reason alone Petitioner's indicia of ownership theory cannot be a basis for Midwest's liability under either the federal or state odometer laws. The case law is devoid of any support for the theory that someone other than the true owner and transferor of a vehicle can be liable for the odometer fraud when, as here, the true owner signs the allegedly false odometer statement.

Also lacking from Petitioner's claims for odometer fraud is any demonstration that Midwest acted with an intent to defraud Petitioner. Indeed, despite Petitioner's willingness to defame all auto auctions as dens of deception, Petitioner neither alleged, with particularity, an intent to defraud, as required by F. R. Civ. P. 9(b), nor came forward with any evidence so much as suggesting that Midwest had an intent to defraud Petitioner.

In his amended complaint, Petitioner asserted a claim for negligence against Midwest for not detecting defects in the Porsche and not discovering that the odometer reading was inaccurate. But established Michigan law, cited by the district court in its opinion, has rejected a duty of inspection on the part of auctioneers. Petitioner's negligence claim was also at odds with the undisputed facts, because it was premised on the allegation that Midwest performed mechanical work on the Porsche. As the district court noted, the affidavits attesting to the fact that Midwest did no mechanical work on the vehicle were uncontroverted.

Here, as in the courts below, Petitioner tries to find fault with Midwest because it did not discover problems with the Porsche when it was driven several hundred feet on Midwest's premises. The district court rejected Petitioner's contention by pointing out Petitioner's testimony that the Porsche performed fine when it was

driven several hundred miles to Chicago immediately after the auction.

The district court also found that Petitioner's claim against Midwest for misrepresentations was factually unsupportable under established Michigan law.[1] Petitioner's challenge to that finding is nothing more than his disagreement with the district court's assessment that "it was incredulous for the plaintiff to have perceived the statements [of] the auction company's employees to have been anything other than mere seller's talk."

Under a similar analysis, the district court found Petitioner's claim against Midwest under Michigan's consumer protection act to be lacking factual support. Here, too, the district court did not resolve any uncertainty in Michigan law, but merely applied a statute in a manner consistent with its language and construction by the Michigan courts. Deference by the court of appeals to the district court's factual assessments was wholly proper and not in any way at odds with *Salve Regina*.

III.

PETITIONER FAILED TO PRESERVE ANY OBJECTION TO THE SANCTIONS IMPOSED UNDER F. R. CIV. P. 26(g).

On reference from the district judge, the magistrate below imposed sanctions under Rule 26(g), F. R. Civ. P., against Petitioner for serving oppressive and largely incomprehensible interrogatories and document requests

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[1] If anything, the district court was extremely charitable to Petitioner in disposing of his claim, as was the Court of Appeals. Petitioner, to explain his untimely service of the summons and original complaint upon Midwest, asserted that he had no basis to sue Midwest in September 1986. (R. 58, pp. 1-2). That assertion simply cannot be squared with his later contention that the auctioneer misrepresented the condition of the vehicle. If any such misrepresentations had been made when he bought the Porsche in 1985, he certainly would have been aware of them in 1986, when he sued.

upon Midwest and its officers. The district court refused to set aside the sanctions for the simple reason that Petitioner, despite seeking and obtaining an extension, then failed to timely file his objections to the magistrate's order. Rather than file objections to the sanctions within the *enlarged* time period, Petitioner filed out-of-time a motion for a second extension. The district court denied the motion, with this apt observation:

> "The filing of the emergency motion and the request for a second extension for filing his appeal from the discovery sanction simply support Magistrate Pepe's finding that plaintiff has the capacity and willingness to argue and litigate at great length the smallest of items." (Appendix, pp. C-8-C-9)

Petitioner's failure to file timely objections is the sole reason the district court did not review the magistrate's order imposing sanctions against Petitioner. Petitioner's neglect also waived any right to appeal from the district court's order affirming the magistrate's order. *Thomas* v. *Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985).

CONCLUSION

Respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

BODMAN, LONGLEY & DAHLING

By: /s/ James J. Walsh
Counsel of Record

Attorneys for Respondents
34th Floor, 100 Renaissance Center
Detroit, Michigan 48243
(313) 259-7777

DATED: September 20, 1991

APPENDICES TO BRIEF IN OPPOSITION

APPENDIX A

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated November 23, 1988)

(JOSEPH P. LONGO, Plaintiff, v. DON GLIME, Individually and d/b/a PERRI AUTO SALES, MIDWEST AUTO AUCTION AND SERVICE, ALVIN MICHEL, and JAMES KERNEN, Defendants — CIVIL NO. 86-73842; HON. PHILIP PRATT, CHIEF JUDGE)

The plaintiff, Joseph Longo, brings this action alleging various claims based on alleged misrepresentations made by the defendants as to the condition of an automobile purchased by the plaintiff.[1] The defendants, Midwest Auto Auction and Service (Midwest), Alvin Michel, and James Kernen now move for summary judgment. Defendants Michel and Kernen are corporate officers of Midwest. The defendants contend that the evidence adduced by the plaintiff is insufficient to allow his claims to go to the jury.

On or about September 6, 1985, the plaintiff attended an auction conducted by Midwest. Plaintiff observed a Porsche 924 that was to be auctioned and made some brief inquiries of its owner, Don Glime. The plaintiff testified that Glime assured him that the car was in perfect condition and that the miles on the odometer were

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[1] Although the plaintiff appears in *pro per*, the amenity usually afforded to *pro per* litigants is not appropriate since the plaintiff is an attorney licensed to practice in Illinois.

actual. (Longo dep. at 30).[2] He also testified that the auctioneer, an employee of Midwest, stated that "the automobile was in perfect condition with new brakes and actual mileage." (Longo aff. at para. 7, Exh. A to Plaintiff's Response to Motion for Summary Judgment). His affidavit also reveals that a Midwest employee who drove the Porsche through the bidding line stated that it ran "great". (*Id.* at para. 3-5). Allegedly on the basis of the statements made by Glime and the Midwest employees, the plaintiff purchased the car.

After his purchase, the plaintiff received various documents relating to his purchase. These documents included a Certificate of Title, an odometer statement, an unnamed document describing the automobile, mileage and seller, a bill of sale, and a buyer's guide. These documents uniformly show that Donald Glime, doing business as Perri Auto Sales, was the owner and seller of the automobile. The only document which references Midwest is a Bill of Sale form on Midwest letterhead. This document is *not* signed by any officer of Midwest and includes the following statement:

> Notice: Auction, Auctioneer, claims no title in himself or itself, but rather is acting solely as an agent for the seller and as such Midwest Auto Auction & Service, Inc., Auctioneer, makes no warranty with respect to title nor assumes any liabilities to any purchaser.

Finally, the "buyer's guide", which was affixed to the window of the auctioned Porsche, stated that no warranty is given, and that the buyer is purchasing the automobile "as is". The plaintiff signed this document.

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[2] In the plaintiff's supplemental reply brief submitted on September 21, 1988, he now asserts that defendant Kernen was standing nearby and confirmed the representations made by Glime.

After the transaction was completed, the plaintiff returned to Chicago on a commercial air carrier. A co-worker drove the purchased automobile to the plaintiff's Chicago residence. During this trip the automobile functioned well. (Longo dep. at 44). Shortly thereafter, however, problems developed that were minor at the onset but which later became more substantial. The plaintiff took the automobile to two mechanics who concluded that the engine had been recently "patched up" to deaden rattling engine noise and that a heavy additive to the fuel had been employed to accomplish the same purpose. According to both mechanics, the car had been driven significantly more than the 59,125 miles registered on the odometer. (D'avola & Sulka aff., Exh. J & K to Plaintiff's Response). In order to remedy the defects discovered, the plaintiff authorized repairs in the amount of $5,600, which included significant transmission repair.

The plaintiff then brought this suit to recover damages for misrepresentation, negligence, and odometer tampering. The following counts were alleged against the movants:

Count Eight: Negligence;

Count Nine: Violation of the Michigan Consumer Protection Act, M.C.L. 445.901 *et seq.*;

Count Ten: Violation of the Michigan Vehicle Code, M.C.L. 257.233a;

Count Eleven: Violation of the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981 *et seq*; and

Count Twelve: Fraudulent Misrepresentation.

Other allegations refer to Midwest, but they in essence reiterate the counts summarized above.

The defendants moved to dismiss the state law claims based on fraudulent misrepresentation and on violation of the Michigan Vehicle Code, as well as the federal statutory claim based on violation of the Federal Motor Vehicle Information and Cost and Savings Act, for failure to plead fraud with sufficient particularity as required by Rule 9(b).

Rule 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). More specifically, the plaintiff must plead the time, place, and content of an alleged false representation. *McGinty* v. *Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980); *Felton* v. *Walston & Co.*, 508 F.2d 577, 581-82 (2d Cir. 1974). Rule 9(b) is designed to promote three functions:

> first, to inhibit the filing of a complaint as a pretext for discovery for unknown wrongs; second, to protect potential defendants from the harm that comes to their reputation when charged with a crime involving moral turpitude; and, third, to ensure that allegations of fraud are sufficiently concrete and particularized so that the defendant has notice of what conduct is complained of, thus enabling the defendant to prepare a defense.

Sterling National Bank & Trust v. *Federated Department Stores*, 612 F.Supp. 144, 147-48 (S.D.N.Y. 1985); *see Kula* v. *J.K. Schofield & Co., Inc.*, 668 F.Supp. 1126, 1134 (N.D. Ill. 1987).

In those cases in which the plaintiff presents in federal court a state law claim alleging fraud, the dictates

of Rule 9(b) apply. *Hayduk* v. *Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) (emphasis in original). While Rule 9(b) clearly applies to the state law misrepresentation claim, it also applies to the state and federal statutory odometer fraud claims. In order to obtain a civil remedy under either statute, the plaintiff must prove the defendant acted with an "intent to defraud." 15 U.S.C. § 1989(a); M.C.L.A. § 257.333a(5). Without alleging fraud, therefore, the plaintiff has no claim under either statute.

In the present case, the plaintiff failed to present any facts pertaining to the liability of the defendants Kernan and Michel until he submitted his second supplemental reply brief on September 21, 1988. Dismissing the claims against defendants Kernen and Michel, therefore, comports with the three-pronged purpose behind the creation of Rule 9(b): First, it prevents the plaintiff from suing persons in the hope that facts might subsequently surface which would support the allegations; second, dismissal would protect the individual defendants' reputation from further damage resulting from the plaintiff's allegations; third, factual allegations contained in a supplemental reply brief, filed over two years after the filing of the original complaint, nearly nine months after the filing of the amended complaint, and over five months after the filing of the defendants' motion to dismiss cannot be said to provide the individual defendants with adequate notice of the charges against them. Therefore, without addressing the merits of the plaintiff's contentions against Kernen and Michel, the court dismisses the claims against these individual defendants for failure to comply with Rule 9(b).

Similarly, the defendant Midwest correctly asserts that the plaintiff's amended complaint does not sufficiently particularize the fraud allegedly perpetrated by

Midwest. However, in the plaintiff's response brief to the defendants' motion for dismissal, the plaintiff did assert particularized descriptions of Midwest employee conduct that allegedly constituted fraud. For various reasons Midwest had over four months to respond to the plaintiff's more particularized allegations of fraud. The court concludes that "[n]o benefit can be had by requiring the [plaintiff] to replead [his] allegations to make clear in the amended complaint what is already clear from the totality of [the] submissions to date." *Fischer* v. *New York Stock Exchange*, 408 F.Supp. 745, 756 (S.D. N.Y. 1976). The court, therefore, refuses to find that the claims against Midwest should be dismissed for failure to plead fraud with sufficient particularity as required by Rule 9(b).

In the alternative, the defendant Midwest moved to dismiss all counts for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Because the parties have submitted for consideration matters outside the pleadings, the court will treat the defendants' motion as a motion for summary judgment under Rule 56(c). Fed. R. Civ. P. 12(b).

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate when the record establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Roland* v. *Johnson*, 86-1737, 1852, slip. op. at 10 (6th Cir. September 9, 1988). The moving party need not "negate" the opponent's claim nor "produce evidence showing the absence of a genuine issue of material fact," but need merely establish "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.* v. *Catrett*, ___ U.S. ___, ___, 106 S. Ct. 2548, 2553-54 (1986); *see also Banks* v. *Rockwell International*, 855 F.2d

324, 325 (6th Cir. 1988). After the parties have had sufficient time for discovery, upon motion the court must enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex*, 106 S.Ct. at 2552-53.

NEGLIGENCE

The gravamen of the Count Eight negligence claim is that defendant Midwest was negligent for failing to institute internal procedures to protect consumers from automobile defects and for failing to verify incoming and outgoing odometer statements. In addition, plaintiff asserts that Midwest should have known that the Porsche had mechanical defects and that the odometer reading was inaccurate because Midwest had repaired, maintained, inspected and driven the automobile.[3]

In order to prove negligence under Michigan law, the plaintiff must establish that the defendant owes the plaintiff a legal duty, that defendant did not exercise ordinary care in performing this duty, and that the defendant's negligence was the proximate cause of the injury incurred by the plaintiff. *Temborious* v. *Slatkin*, 157 Mich. App. 587, 599 (1986) (per curiam). In Michigan, however, auctioneers have no duty to inspect items they auction. The court in *Meyers* v. *Robb*, 82 Mich. App. 549, 556 (1978), reasoned "that the risk cre-

[3] The plaintiff presented conflicting legal theories supporting the allegations contained in Count Eight. In the complaint, the plaintiff claimed the defendant was negligent in various ways. In subsequent briefs, however, the plaintiff characterized Count Eight as including a claim of misrepresentation. Although the plaintiff has apparently attempted to transform the legal theory alleged in Count Eight from negligence to misrepresentation, the court will consider his misrepresentation arguments as pertaining to the misrepresentation claim contained in Count Twelve.

ated by an auctioneer's failure to inspect the items to be sold is a reasonable risk" and, as a result, does not serve as the basis for which an action in negligence may be maintained. Therefore, the defendant's failure to inspect the Porsche and its failure to institute procedures to prevent the sale of defective automobiles or of automobiles having inaccurate odometer readings is not actionable.

The plaintiff also maintains, however, that Midwest took the affirmative steps of repairing, maintaining, and inspecting the Porsche and, as a result, should have known of its mechanical defects. This allegation, however, is not supported by the record. The affidavits of the defendant officers indicate that Midwest did no mechanical work on the automobile. The court, therefore, refuses to find the defendant negligent on this basis.

The plaintiff also maintains that because the automobile allegedly rode poorly, the defendant's employees should have known that the transmission was in disrepair and that the odometer was inaccurate. The plaintiff's proofs, however, contradict such a theory. First, the plaintiff stated that the co-worker who drove the car to Chicago informed the plaintiff that the car performed fine and "was a nice ride." (Longo dep. pp. 43-44). In addition, the plaintiff acknowledged that before he discovered a problem with the automobile, either he or his family increased the mileage on the car. (Longo dep. p. 45). The court, therefore, refuses to infer that Midwest employees who drove the car from the storage area to the auction area should have detected the alleged defects based on the manner in which the car performed.

For the foregoing reasons, the court finds that the defendant Midwest is entitled to judgment as a matter

of law as to the negligence claim and, therefore, grants summary judgment as to Count Eight.

FEDERAL MOTOR VEHICLE INFORMATION AND COST SAVINGS ACT

The plaintiff alleges that the defendant Midwest either knew or should have known that the odometer reading on the automobile was inaccurate and, therefore, violated the disclosure requirements contained in 15 U.S.C. § 1988. Section 1988 provides:

> [T]he Secretary shall prescribe rules requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle:
>
> (1) Disclosure of the cumulative mileage registered on the odometer.
>
> (2) Disclosure that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually traveled.

15 U.S.C. § 1988(a). The question presented is whether an automobile auction company that takes possession of an automobile but does not take title is a "transferor" within the meaning of the federal statute.

A transferor is defined in the regulations as follows: "Transferor means any person who transfers his ownership in a motor vehicle by sale, gift, or any means other than by creation of a security interest." 49 C.F.R. § 580.3.[1] *Industrial Indemnity* v. *Arena Auto Auction*, 638

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[1] The court is cognizant the Department of Transportation recently promulgated a revised definition of the term "transferor". *See* 53 Fed. Reg. 29464 (to be codified at 49 C.F.R. § 580.3). Because this revision does not become effective until April 29, 1989, the amending regulation is not applicable to the dispute before the court.

FSupp. 1030, 1034-35 (D. Minn. 1986), the court held that an auction company is not a "transferor" when it does not take title to the automobile to be auctioned. The court specifically distinguished the Eighth Circuit's decision in *Tusa* v. *Omaha Auto Auction, Inc.*, 712 F.2d 1248 (8th Cir. 1983), in which the auction company was deemed a "transferor," solely on the fact that the auction company in *Tusa* accepted title.

Finding the *Industrial Indemnity* decision persuasive, the court hold that since defendant Midwest never took title to the Porsche, the defendant was not a "transferor" within the meaning of section 1988(a).[5] The court, therefore, grants summary judgment as to the claim based on the Federal Motor Vehicle Information and Cost Savings Act.

MICHIGAN VEHICLE CODE

In regard to the Michigan odometer provision, the issue is again whether an auctioneer is a "transferor" within the meaning of the state statute. This issue is apparently one of first impression. The Michigan Vehicle Code reads in part:

> (1) When the owner or assignor of a registered vehicle transfers or assigns his title or interest in

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[5] The plaintiff contends that *Goeman* v. *Keating*, 498 FSupp. 700 (S.D. S.D. 1980) applies in this case. In *Goeman*, the court held that when a father holds title to a car for the benefit of his son, although the son retained possession and control over the car, himself transacted to sell the car, and retained the profits made from the sale, the father was not the "owner" of the vehicle.

The plaintiff has simply failed to produce evidence that Midwest exerted the degree of control over the Porsche that the son did in *Goeman*. There is no evidence that Midwest employees drove the car other than within their facility, nor is there evidence that Midwest earned any profit other than its customary fee. Under such circumstances, the court refuses to conclude that Midwest exercised such a high degree of control over the car that it should be deemed the "defacto owner" of the Porsche.

> that vehicle, then the transferor or assignor shall furnish to the transferee or assignee a written statement signed by the transferor or assignor containing the following information:
>
> > (a) The odometer reading at the time of transfer or assignment.
> >
> > * * *
> >
> > (e) A statement that the actual mileage is unknown if the odometer reading differs from the number of miles the vehicle has actually traveled.

M.C.L.A. § 257.233a(1)(a), (e). The court interprets the term "transferor" in the statute as meaning an "owner" who "transfers" title. The term "owner" is defined as follows:

> "Owner" means: (a) any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period of greater than 30 days.
>
> (b) A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or leasee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or leasee or mortgagor shall be deemed the owner.

M.C.L.A. § 257.37. Relying on the definition of "owner" in the statute, the court concludes that Midwest was never an owner of the Porsche. As previously noted,

Midwest never had title to the vehicle. In addition, there is no evidence that Midwest rented or had exclusive use of the vehicle for thirty days. Thus, Midwest was not obligated to comport with the requirements in the statute and the court, therefore, grants the defendant's motion for summary judgment as to the claim based on the Michigan Vehicle Code.

FRAUDULENT MISREPRESENTATION

The plaintiff contends that the representations of the driver in the bidding line and the auctioneer were fraudulent, and, therefore, actionable under Michigan law. In Michigan, in order to establish fraud, the plaintiff must prove the following elements:

(1) That defendant made a material representation;

(2) That it was false;

(3) That when defendant made the statement he knew it was false or made the statement recklessly, without any knowledge of its truth and as a positive assertion;

(4) That defendant made the statement with the intention that it would be acted upon by the plaintiff;

(5) That plaintiff acted in reliance upon the statement;

(6) That plaintiff suffered an injury as a result.

Eaton Corp. v. *Easton Associates*, 728 F.2d 285, 292 (6th Cir. 1984); *Temborius* v. *Slatkin*, 157 Mich. App. 587, 597 (1986) (per curiam).

With regard to the remarks of both the driver and the auctioneer, the court concludes that these statements constitute mere "puffing" or "seller's talk" and, there-

fore, are not actionable in fraud. Michigan has long adhered to the puffing doctrine, in which a salesman is not deemed liable in a civil action for making statements "involving matters of estimate or judgment upon which reasonable men may differ." *Hayes Construction Co.* v. *Silverthorn*, 343 Mich. 421, 426 (1955). Judge Learned Hand explained the rationale behind the puffing doctrine:

> There are some kinds of talk which no sensible man takes seriously and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but as it is, neither party usually believes what the seller says about his own opinions and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.

Vulcan Metals Co. v. *Simmons Manufacturing Co.*, 248 F. 853, 856 (2d Cir. 1918).

Especially in light of the manner in which auctions are conducted, a buyer should be suspicious of an auctioneer's statements made in an attempt to obtain more money at sale. *See Pell City Wood Inc.* v. *Forke Bros. Auctioneers*, 474 So. 2d 694, 695 (Ala. 1985). In addition, Michigan law presumes that an agent-auctioneer does not contract on his own behalf, and in turn is not personally liable, when he discloses both the fact of agency and the name of his principal. *Mercer* v. *Leihey*, 139 Mich. 447, 452-54 (1905).

In the case at bar, the plaintiff spoke with a person he knew to be the true owner of the Porsche and signed a document which indicated that Midwest was a mere agent of that owner. As a result, the plaintiff, a prac-

ticing lawyer, should have realized that in these circumstances Michigan law presumes that the auction company is not liable for defects in goods purchased. Furthermore, the plaintiff was on notice that he purchased the car "as is". See *Pell City*, 474 So. 2d at 695-96 (plaintiff could not sustain claim in fraud against auctioneer based on written affirmations in a brochure since the brochure contained language that goods were sold "as is, where is"). The bill of sale indicated that Midwest made no warranties as to title and assumed no liabilites to any purchaser. The court concludes that under these circumstances, in which Midwest has no legal obligation if the automobile sold is defective in some manner, it was incredulous for the plaintiff to have perceived the statements [of] the auction company's employees to have been anything other than mere seller's talk. Accordingly, the court grants the defendant's motion for summary judgment on the fraudulent misrepresentation claim.[6]

MICHIGAN CONSUMER PROTECTION ACT

In Count Nine, the plaintiff contends that the representations of the driver and the auctioneer also violated various sections of 445.903 of the Michigan Consumer

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[6] While the statement that a car was in "perfect condition" was considered more than mere puffing in *Curby* v. *Mastenbrook*, 288 Mich. 676, 680 (1939), the court concludes that *Curby* is not dispositive in the present case involving alleged fraud. First, the court in *Graham* v. *Myers*, 333 Mich. 111, 114 (1952), a fraud case, refused to find *Curby* applicable to the fraud claim at issue in the case, distinguishing the earlier case as applicable to claims sounding in *negligence*. In essence, the *Graham* court appears to have limited the holding in *Curby* to the particular fact-law pattern involved in that case. Second, the *Curby* case involved misrepresentations made by a used car dealer attempting to sell a car and did not involve statements made by an *agent* of the true owner. Because of the *Graham* court's narrow interpretation of the holding in *Curby* and the varying facts presented in the case at bar, the court refuses to find *Curby* controlling in this case.

Protection Act. The relevant provisions of the Consumer Protection Act that pertain to the challenged statements are as follows:

> (1) Unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> * * *
>
> (c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have
>
> * * *
>
> (e) Representing that goods or services are of a particular standard, quality, or grade . . . if they are of another.
>
> * * *
>
> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.
>
> * * *
>
> (bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.
>
> (cc) Failing to reveal facts which are material to the transaction in light of misrepresentations of fact made in a positive manner.

M.C.L.A. § 445.903(1)(c), (e), (s), (bb)-(cc).

According to the court in *Mayhall* v. *A.H. Pond, Co., Inc.*, 129 Mich. App. 178, 183 (1983) (per curiam), courts are to construe the particular provisions of the Consumer Protection Act "with reference to the common-law tort of fraud." In the context of the fraudulent misrepresentation claim, the court considered the statements of the driver and the auctioneer to be mere puffing and, as a result, not actionable in fraud. With regard to these particular claims under the Consumer Protection Act, which the court construes with reference to the tort of fraud, the contested statements constitute mere seller's talk and are similarly not actionable.

The plaintiff also alleges that the defendant's conduct violated various other provisions of the Consumer Protection Act. The plaintiff claims that Midwest caused "a probability of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods and services." M.C.L.A. § 445.903(1)(a). The plaintiff, however, presents no evidence to support this claim. The plaintiff knew that Glime was the seller and that Midwest was the auctioneer. Because the plaintiff has come forward with no evidence showing that he was confused as to the "source, sponsorship, approval or certification" of the Porsche, the defendant is entitled to summary judgment on this claim.

The plaintiff also alleges that the defendant represented that the "goods [were] new if they [were] deteriorated, altered, reconditioned, used or second hand." M.C.L.A. § 445.903(1)(d). Again, the plaintiff failed to present any evidence suggesting that Midwest maintained that the Porsche was new and, therefore, the defendant is also entitled to summary judgment as to this claim.

The plaintiff also maintains that Midwest was liable for the "gross discrepancies between the oral represen-

tations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits." M.C.L.A. § 445.903(1)(y). The court finds that the defendant did not represent "gross discrepancies" between any oral statements and any written agreements and also finds the defendant promised no "benefits" within the ordinary meaning of that term. Consequently, the court concludes the defendant is entitled to summary judgment as to this claim as well.

Lastly, the plaintiff claims that Midwest caused "coercion and duress as the result of the time and nature of a sales presentation." M.C.L.A. § 455.903(1)(aa). Applying this prohibition to this case would cause an auctioneer to be liable for the sale of any goods auctioned. Any coercion or duress experienced by the plaintiff was caused by his own decision to purchase the Porsche during the limited amount of time he had before his flight to Chicago. The court, therefore, also grants the defendants' motion for summary judgment as to this claim.

RULE 11 SANCTIONS

The defendants requested the court to impose an appropriate sanction on the plaintiff for violating the provisions of Rule 11. According to the Sixth Circuit, "'sanctions may be imposed if a reasonable inquiry discloses the pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay.'" *Herron* v. *Jupiter Transportation Co.*, No. 87-3731, slip op. at 7 (6th Cir. Oct. 3, 1988) (citations omitted); *Smith* v. *Detroit Federation of Teachers Local 231*, 829 F.2d 1370,

1379 (6th Cir. 1987). Additionally, in the Sixth Circuit it is mandatory that the court impose sanctions on a party who submits pleadings deemed in violation of Rule 11. *Smith*, 829 F.2d at 1380; *INVST Financial Group* v. *Chem-Nuclear Systems*, 815 F.2d 391, 401 (6th Cir. 1987).

In the case at bar, the plaintiff's claims against the defendant corporation Midwest were not violative of Rule 11. Those claims for which the court grants the defendant Midwest summary judgment are not so devoid of factual allegations and of legal theory to merit the imposition of sanctions under Rule 11.

However, the claims against defendant Michel and Kernen were indeed sufficiently specious as to violate Rule 11. During the plaintiff's deposition he could not identify the person standing next to Mr. Glime during the auction, he did not know if he could identify the person if he saw him again, and he could not recall what the person said to him. (Longo dep. pp. 31 & 35). Yet, in his supplemental reply brief the plaintiff presented a different account. A year and a half after his deposition testimony, the plaintiff now maintains that after two days of deposition testimony he recognized the defendant Kernen as the man standing next to Mr. Glime. (Longo aff., attached to Plaintiff's Objections to Midwest's Reply Brief). In addition, he also currently contends that the defendant Kernen confirmed the accuracy of Mr. Glime's statements. (*Id.*).

In that same supplemental reply brief, the plaintiff asserts for the first time that his claim against the defendant Michel is based on information obtained through interrogatories in which the defendants admitted that either Michel or Jim Williams acted as the auctioneer on the date the plaintiff purchased the Porsche.

It is clear that on the date the plaintiff filed his amended complaint including Kernen and Michel as

defendants he had no reasonable basis in fact or in law to believe these individuals were legally responsible for the alleged misconduct. As the Sixth Circuit stated in *Albright* v. *Upjohn Co.*, 788 F.2d 1217, 1221 (6th Cir. 1986) (citations omitted), Rule 11 "'stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances.'" *See also Herron*, No. 87-3731, slip op. at 6 (citations omitted); *Smith*, 829 F.2d at 1379 (citations omitted). Because the plaintiff failed to conduct a reasonable inquiry before filing the immediate action against the individual defendants, these claims were not well-grounded in fact as required by Rule 11. Accordingly, the *pro se* plaintiff signed the amended complaint in violation of the requirements of Rule 11.

The nature of the sanction to be imposed remains within the discretion of the district court. *Herron*, No. 87-3731, slip. op. at 11 (citations omitted); *Albright*, 788 F.2d at 1222 (citations omitted). The defendants Kernen and Michel are entitled to an award of both attorneys' fees and expenses incurred on their behalf that were occasioned by the plaintiff's baseless claims against them. The defendants Kernen and Michel are asked to submit an itemized statement, under oath, detailing the amount of fees and costs sought. The plaintiff will be allowed the opportunity to question or contest the reasonableness of the defendants' request.

The court grants summary judgment on all claims in favor of defendants Midwest, Michel, and Kernen.[7] In

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[7] The plaintiff's amended complaint also included various claims against Don Glime. The judgment entered in favor of the defendants in the case at bar, however, obviously does not include the plaintiff's claims against Glime.

addition, the court awards defendants Michel and Kernen attorneys' fees and expenses incurred on their behalf.

IT IS SO ORDERED.

/s/ PHILIP PRATT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: November 23, 1988

APPENDIX B

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed January 27, 1989)

(JOSEPH A. LONGO, Plaintiff, v. DON GLIME, Individually and d/b/a PERRI AUTO SALES, Defendant — Case No. 86-CV-73842-DT; HONORABLE PHILIP PRATT, MAGISTRATE STEVEN D. PEPE)

This is an action over the sale of an automobile the odometer of which was altered prior to sale. On September 12, 1986, plaintiff sued Don Glime and Perri Auto Sales, Glime's company, for, *inter alia*, violating the federal odometer statute. Glime's company, the prior owner of the car, sold it to plaintiff at an auction sale at Midwest Auto Auction & Service, Inc. The claim against Glime and his company has been discharged in bankruptcy. Plaintiff also sued Midwest Auto Auction & Service, Inc., and two of its employees, Alvin H. Michel and James Kernen. On October 6, 1987, this Court dismissed plaintiff's complaint without prejudice against defendants Michel, Kernen, and Midwest Auto Auction & Service, Inc. (hereinafter defendants) for failure to timely serve them as required by Fed.R.Civ.P. 4(j).

On December 17, 1987, plaintiff was granted leave to amend his complaint and add defendants. While plaintiff acknowledged that initially he "believed that no evidence of wrongdoing existed to justify suing Midwest" (Plaintiff's Response to Defendants Motion for Protective Order, docket entry #113, p. 2), he later discovered that Midwest sold more than 200 of Glime's cars over a

three year period, and that Midwest "preps" the automobiles before sale, washing them and performing minor repairs. *Id.* at 2. Plaintiff asserted that "Midwest knew or should have known, that the automobile had more miles than registered on the odometer." *Id.* Plaintiff contended Midwest was informed that it was to become a defendant four weeks before Glime filed for bankruptcy on November 23, 1988. Summary judgment was granted for defendants on these claims, and sanctions were awarded for claims against Michel and Kernen in their individual capacity.

This opinion and order deals with an award of sanctions on two earlier defense motions for protective orders.

Defendants Michel, Kernen, and Midwest Auto, through their counsel James Walsh, brought a motion for a protective order and sanctions for plaintiff filing interrogatories and requests for production that violated Fed.R.Civ.P. 26(g) by being excessive, harassing, and not framed in response to the needs of the case. Prior to filing the motion, defense counsel asked plaintiff, an attorney in Illinois who at the time was acting *pro se*, to withdraw the discovery requests.

I granted defendants' motion for a protective order and struck the discovery requests, giving plaintiff 30 days to serve proper discovery requests upon the defendants. I took the defendants' requests for attorney's fees and sanctions under advisement.

Four days after the court hearing in which plaintiff's discovery requests were stricken, plaintiff submitted amended interrogatories and requests for production. In a cover letter of March 11, 1988, plaintiff asked Walsh to contact him if there was any problem with these amended discovery requests. Following a telephone conversation between Longo and Walsh regarding the

amended discovery requests, plaintiff wrote Walsh trying to clarify and restrict certain requests. Defendants then filed a second motion for a protective order and sanctions.

At the hearing on this second motion for a protective order, I asked Walsh to supply the court with a comparison of the initial and the revised discovery requests. Plaintiff said that he had reread all of the defendants' objections to the initial discovery requests. He also contacted "an Odometer Fraud attorney, Mr. Frank P. Kosbahm" to evaluate the interrogatories. Longo stated that Kosbahm "responded that every single interrogatory was relevant or reasonable calculated to lead to relevant evidence." Longo's Letter to Walsh of March 16, 1988, Exhibit C to Longo's Response to Motion for Sanctions (docket entry #162).

At a hearing on defendants' second motion for a protective order and other motions, I ordered that defendants answer certain interrogatories and requests for production and took the matter of sanctions under advisement pending receipt of defendants' comparison of the two versions and plaintiff's written response.

Defendants have supplied a document comparing the original and revised discovery requests. Defense counsel has also submitted a copy of his billings on this matter that he has forwarded to his client, as well as supplemental time entries that had not yet been billed.

Plaintiff's revised interrogatories are largely similar to the initial set. They seek much data only marginally related to the case and unlikely to lead to relevant material.

Of the interrogatories submitted to Michel and Kernen, who were officers of Midwest Auto Auction, the revised interrogatories still contained the following:

1. Marital status and length of marriage, birth date, residence for past ten years, social security and driver's license number;

2. Jobs and job descriptions for the past 10 years, reasons for job termination and name of job records custodian;

3. Any name changes and reasons therefore;

8. With respect to other persons employed by Midwest Auto Auction on the date of plaintiff's car purchase:

   - terms of employment and pay
   - custodian of their employment records
   - dates and reasons for their termination;

9. Lists of employees whose employment terminated in the past seven years of every entity *other* than Midwest Auto Auction in which any defendant has or had an interest and including:

   - terms of their employment
   - dates and reasons for their discharge
   - current employer, including address and phone number;

12. Identity of "every person who knew, or was acquainted with Don Glime, d/b/a Perri Auto Sales or his or its agent, associate, friend or acquaintance or any agent of those who may know Don Glime, d/b/a Perri Auto Sales or any agent of Perri Auto Sales known to Midwest, its employees or related entities," including last known addresses and telephone numbers of former employees and their new employer;

14. Did Midwest know, or have any opinion or belief that "Don Glime, d/b/a Perri Auto Sales or any other" person opened the hood of the car that

plaintiff purchased, started its engine, drove, moved, handled or touched it or removed or added any item to it;

17. State the reasons other than sale for which a vehicle could be stored on defendant's property;

18. Whether in the past seven years defendants through Midwest, related entities, independent contractors or other means provided any services to *purchasers* or sellers or vehicles;

20. Whether defendants are aware of or have an opinion about the existence of the use of a person planted solely to increase the bidding price without any actual intent of purchasing the car;

Of the 30 original interrogatories submitted to these individual defendants which the court struck as burdensome, plaintiff in his revised set filed after the initial set omitted only five interrogatories:

15. Any claim or complaints or other concerns filed against defendants or any entity in which they had an interest for the past 10 years;

16. The amounts charged for the past seven years for sales and purchases of vehicles and non-vehicles;

19. In the past seven years have defendants allowed "non-employees or agents to perform services" including maintaining, repairing, adjusting, cleaning, checking or inspecting vehicles, including a description of the services, name address phone number of persons allowed to perform such services;

29. "Describe the basis of all personal records that you keep referring to or relating to all businesses

or entities in which you have an interest or are an officer."

30. Personally or as an officer of Midwest Auto Auction or any other entity, do you or any other person value the vehicles after they arrive at an entity in which you have an interest or are an officer."

Of the original interrogatories submitted to the corporate defendant Midwest Auto Auction, plaintiff's revised set omitted only three reducing the total number to 48 interrogatories. Sub-parts and instructions make the actual number of inquiries far greater. The three interrogatories plaintiff omitted were:

3. Is any advertising calculated to reach Illinois residents;

6. Identify the number of all non-Michigan purchasers for the past seven years;

34. Describe the relationship between Midwest Auto Auction and Midwest Recovery and Adjustment Service, Inc. and identify common shareholders, officers, assets and buildings;

Interrogatory 50 was re-submitted as revised interrogatory 32. On various other interrogatories, plaintiff changed "describe the basis" to "describe" or "name".

The revised requests for production was reduced in number as follows:

Instead of 12 numbered requests for all documents relating to each numbered count in plaintiff's complaint, one request was made for all documents relating to every count of plaintiff's complaint;

Instead of the multiple separate requests relating to each count of the answer and affirma-

> tive defenses of Don Glime, d/b/a Perri Auto Sales, plaintiff asked Midwest Auto Auction for all documents of contracts, agreements and cards of Don Glime, d/b/a Perri Auto Sales;
>
> Instead of multiple separate requests for documents related to each count of defendant's answer, a single request was made relating "to every count of your answer."

In effect, it appears that plaintiff only omitted three document requests:

(1) Plaintiff no longer sought documents relating to Don Glime, d/b/a Perri Auto Sales' answer and affirmative defenses that were not documents included in defendant Midwest's contracts, agreements, or cards relating to Don Glime;

(2) Plaintiff no longer requested "[a]ll correspondences and other documents received by or submitted to the plaintiff."

(3) Plaintiff no longer requested "[a]ll documents requested in plaintiff's interrogatories to the defendants."

It was earlier found that plaintiff's two sets of interrogatories and requests for production were overbroad and burdensome. They were striken by the court and plaintiff was given 30 days to serve proper discovery requests upon defendants. Instead of using this time to make a good faith effort to limit the discovery requests to relevant information that was actually needed, plaintiff took only four days to make only token and minor changes in his discovery requests. I find that plaintiff's revised discovery requests were still overbroad and burdensome given the nature of the case, the amount in controversy, and the degree or likely degree of involvement by the defendants. I further find that plaintiff did

not act in good faith in an attempt to comply with the court's order, and has violated that order. I find that plaintiff signed the original and the revised discovery requests involved in this motion in violation of Fed.R.Civ.P. 26(g), since I find that much of the discovery sought was for the improper purpose of harassing defendants and needlessly increasing the costs of litigation and were unduly burdensome and expensive given the needs of the case, the amount in controversy, and the importance of certain of the issues at stake in the litigation to which the discovery was directed.

Accordingly, I find that sanctions should be awarded under Fed.R.Civ.P 26(c) and (g).

In his defense, plaintiff states that the Court did not give him specific directions or guidelines as to how the discovery should be modified. He notes he did strike the discovery requests over the wives of the Midwest officers and document requests regarding Don Glime's answer and affirmative defenses, which at the hearing were specifically noted by me as clear examples of certain requests being too broad. Plaintiff also asserts he spent hours reconsidering the discovery and objections and consulted for several hours with Frank Kosbahm, an "Odometer Fraud attorney." Plaintiff also states that his renewed efforts to consult with defense counsel Walsh about the revised interrogatories were rebuffed by Walsh, who filed this motion without efforts of complying with Local Rule 17.

Plaintiff asserts that Walsh did not provide the Court with copies of the revised discovery until a specific request for it was made at the hearing on this second motion for a protective order. Plaintiff states that "[h]e believes he has fully complied with the Court Order."

Finally plaintiff asserts that the $10,000 to $12,000 damages might be trebled and that the case is complicated.

Defense counsel Walsh has submitted billings totalling 19 hours spent on these discovery requests and the two motions for protective order. At an hourly billing rate of $140, Walsh has spent a total of $2,660 struggling with plaintiff's improper discovery requests.

Regarding the initial motion for a protective order, Walsh noted, in paragraph 7 of his motion, that he did attempt to persuade plaintiff to withdraw and resubmit discovery requests that complied with Fed.R.Civ.P 26(g), but that plaintiff refused to do so. Walsh's itemized billings show a conversation with Longo on February 3, 1988. Walsh filed a thorough motion and memorandum of law explaining exactly why and how the discovery requests were improper. Walsh had another conversation regarding the motion to strike the interrogatories on February 29, 1988, after the motion had been filed.

Instead of submitting modified and reduced discovery requests, Longo opposed the motion to strike, contending that Walsh would not discuss the various interrogatories in an attempt to clarify any confusion. Longo gives examples of how he could have clarified problem areas.

From the various motions and conferences I have had with Longo, I find that he has the capacity to talk and argue at great length over the smallest of items. Given the fact that Walsh was charging his client $140 per hour, I find it was not unreasonable for him not to spend hours assisting the plaintiff to clarify and reformulate his interrogatories, but rather ask the plaintiff to resubmit them in a clearer and more targeted fashion. Given the fact that even after this Court ordered Longo to rewrite and narrow his discovery, Longo made only

token changes and only where the Court specifically gave him guidance, I find that further conferencing by Walsh with Longo over each of the interrogatories would not have been cost efficient. I find that on the first motion for a protective order, Walsh has complied with Local Rule 17 sufficiently so that an award of attorney's fees is not precluded. I find his hours submitted to be reasonable.

Walsh did not file his second Motion to Strike until after having a 20 minute telephone conversation with Longo, in which he again complained about the overbreadth and burdensomeness of the discovery and having received a March 16, 1988, letter from Longo. In this letter, Longo reasserted the legitimacy of the discovery requests and again indicated a desire to discuss each of Walsh's objections.

Regarding interrogatory 3 (seeking "all complaints, claims, defects, malfunctions and so forth of all vehicles transferred or acquired by Don Glime, d/b/a Perri Auto Sales"), Walsh complained that an answer would require interviewing Midwest's 15 employees. (This, of course, assumes the interagtory is limited to cars "transferred or acquired by" Perri Auto Sales through Midwest Auto Auction.) Longo's letter notes, "Please remember that every corporation must seek from its employees information to answer interrogatories. An intercompany memorandum may facilitate the process." After making only minor changes in his discovery after the Court's order, Longo boldly asserts in his letter that he is "making every effort to work with you pursuant to the local rules. However, it appears that I am not receiving the same cooperation in exchange." The resubmitted interrogatories, which continue to explore unnecessary and minor tributaries and backwaters far removed from the mainstream of this litigation, suggest no good faith

effort to work with Mr. Walsh or to respect this Court's orders.

Accordingly, I find that Mr. Walsh was excused from further efforts under Local Rule 17 prior to filing his second motion for a protective order. Longo is an attorney and can be expected to practice law before this Court at a higher level of sophistication and good faith than he has demonstrated to date. Under a false guise of naivete, Longo has intentionally made efforts to impose unnecessary costs upon defendants in a case that was found to have no merit. He has also imposed substantial costs upon this Court to deal with this and other disputes that have resulted from his efforts to "overlitigate" this case.

I find that the hours submitted by Walsh on the second motion for a protective order include matters involved in the case unrelated to the motion to strike. I have reduced them by two (2) hours to compensate for this. I find that 17 hours is a reasonable amount of time for the various contacts with Longo regarding the discovery, research, drafting, preparation, and arguing of two motions for a protective order. Walsh's hourly billing rate of $140 lies somewhere between the 50th ($110/hour) and the 75th ($150/hour) percentile for 1988 hourly billing rates for attorneys practicing in downtown Detroit. *See, Michigan Bar Journal*, p. 23 (November 1988). I find this rate to be generous but not unreasonable, given that Walsh is a senior litigator at one of Detroit's more prestigious law firms.

Accordingly, I find $2,380 to be reasonable expenses for plaintiff's violation of Fed.R.Civ.P. 26(g) in his first and second discovery submissions to defendants. I hereby order that this sum be paid by Longo to Walsh,

on behalf of his clients, within thirty (30) days of this order.

SO ORDERED.

/s/ STEVEN D. PEPE
UNITED STATES MAGISTRATE

Dated: January 27, 1989
Ann Arbor, Michigan

(Pursuant to Rule 77(d), FRCivP COPIES HAVE BEEN MAILED TO THE FOLLOWING: Joseph Longo, Don Glime, James Walsh, Morris Leskowitz on January 27, 1989.)

APPENDIX C

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated June 21, 1989)

(JOSEPH P. LONGO, Plaintiff, vs. DON GLIME, Individually and d/b/a PERRI AUTO SALES, MIDWEST AUTO AUCTION AND SERVICE, ALVIN MICHEL, and JAMES KERNEN, Defendant — CASE NO. 86-CV-73842-DT; HONORABLE LAWRENCE P. ZATKOFF)

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 21st day of June, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This action arose over the sale of an automobile by defendant Don Glime, d/b/a Perri Auto Sales, to plaintiff, Joseph Longo. The sale was made by auction. The auction was conducted by defendant Midwest Audo Auction and Service Inc. (Midwest) on September 6, 1985. Defendants Alvin Michel and James Kernen are the majority shareholders and corporate officers of Midwest.

This lawsuit was initiated on September 12, 1986. On December 17, 1987, plaintiff was granted leave to file an amended complaint. The amended complaint was filed January 25, 1988.

On March 4, 1988, United States Magistrate Steven Pepe conducted a telephone hearing regarding a motion for protective order and sanctions brought by defendants Midwest, Michel and Kernen. Magistrate Pepe

granted the motion for protective order, but gave plaintiff 30 days in which to serve proper discovery requests upon the defendants. Magistrate Pepe took the issue of sanctions under advisement.

Four days after the hearing, plaintiff filed a second set of interrogatories which resulted in a second motion for protective order and sanctions filed by defendants. At a hearing on the second motion, Magistrate Pepe ordered defendants to answer certain of the interrogatories and discovery requests and again took the matter of sanctions under advisement.

Defendants Midwest, Michel and Kernan subsequently moved for summary judgment. On November 23, 1988, Chief Judge Phillip Pratt granted summary judgment in favor of defendants Midwest, Michel and Kernen. Judge Pratt also found defendants Michel and Kernen entitled to sanctions pursuant to Fed. R. Civ. P. 11. Only claims asserted against defendant Don Glime remain before the Court.

On March 7, 1989, the lawsuit was reassigned to this Court. The following matters are pending before the Court:

1. Plaintiff's motion of December 15, 1988, for leave to file a motion for reconsideration of the Memorandum Opinion and Order of November 23, 1988, that granted sanctions against plaintiff;

2. Brief filed on behalf of Michel and Kernen to determine the amount of the sanction ordered by the Court on November 23, 1988;

3. Plaintiff's supplemental brief in support of leave to move for reconsideration of the sanction ordered by the Court on November 23, 1988;

4. Plaintiff's motion to stay the determination of sanctions pending the determination of plaintiff's motion for reconsideration of the sanctions awarded November 23, 1988;

5. Plaintiff's motion of February 21, 1989, to extend time to file an appeal of Magistrate Pepe's order of discovery sanctions dated January 27, 1989;

6. Defendant's motion to dismiss the appeal of the Magistrate's order of January 27, 1989;

7. Plaintiff's brief for reconsideration of the Magistrate's order of January 27, 1989, with supplement.

After maneuvering through the maze of motions, briefs and pleadings filed in this matter, the Court finds only three issues to be resolved:

1. Whether the district court's sanction award of November 23, 1988 should be reconsidered;

2. If the sanction is not reconsidered, the Court must determine the amount of the sanction;

3. Whether the magistrate's discovery sanction should be reviewed.

Each issue is addressed separately.

I.

WHETHER THE SANCTION AWARD OF NOVEMBER 23, 1988, SHOULD BE RECONSIDERED

A Court order should not be reconsidered unless the appropriate motion is filed within ten days of the entry date of the order to which reconsideration is sought. Local Rule 17(m)(1). Reconsideration should only be granted if there exists a palpable defect by which the

Court and parties have been misled, the correction of which would require a different disposition of the case. Local Rule 17(m)(3).

In this case, plaintiff's motion for reconsideration must be denied as untimely and without merit.

On November 23, 1988, the Court issued a Memorandum Opinion and Order granting defendants' motion for partial summary judgment as to defendants Michel, Kernen and Midwest, and granting in part defendants' motion for sanctions. Pursuant to Federal Rules of Civil Procedure 6(a) & (e), plaintiff had until December 13, 1988, to file a timely motion for reconsideration as provided in Local Rule 17(m)(1). Plaintiff filed a motion to enlarge the time to file a reconsideration on December 15, 1988.

The request for an extension of time to file a motion for reconsideration is governed by Federal Rule of Civil Procedure 6(b). Rule 6(b) provides in part:

> [T]he court for cause shown may at any time in its discretion (1) with or without motion or notice order the [relevant specified] period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. . . .

Fed. R. Civ. P. 6(b). Had plaintiff filed this motion for an extension before the expiration of the period prescribed for filing a Local Rule 17(m) reconsideration motion, which was no later than December 13, 1988, the Court in its discretion would have been free to grant an extension "for cause shown" pursuant to Rule 6(b)(1). How-

ever, because plaintiff failed to submit the extension motion before the expiration of the prescribed period, the motion is governed by the stricter standards enunciated in Rule 6(b)(2).

Pursuant to Rule 6(b)(2), the Court may grant an extension motion filed after the expiration of a prescribed filing date if the movant can establish both that there was sufficient cause for the delay and that failure to respond timely was the result of excusable neglect. *See United States* v. *Miller Bros. Constr. Co.*, 505 F.2d 1031 (10th Cir. 1974). The district court is to exercise sound discretion in determining whether the neglect involved is excusable. *Davidson* v. *Keenan*, 740 F.2d 129 (2d Cir. 1984); *Woods* v. *Allied Concord Fin. Corp.*, 373 F.2d 733 (5th Cir. 1967).

In the case at bar, plaintiff contends that he was unable to file a timely motion for reconsideration because he was vacationing for an unspecified period, but which evidently concluded sometime during the first week of December, 1988. In support of the motion, plaintiff stated that while he was "on vacation, the court's ruling was issued. . . . Being out-of-town has caused prejudice to file a timely motion for reconsideration. Since his return from vacation, the plaintiff has been trying to catch up from the backlog."

Such a vague and conclusory assertion, which does not apprise the Court of the dates plaintiff commenced and concluded his vacation, does not constitute "excusable neglect." Plaintiff has provided no reason why he could not have either filed his motion for reconsideration or sought a Rule 6(b)(1) enlargement prior to December 13, 1988. Therefore, based on the facts presented, the Court simply cannot conclude that plaintiff's failure to act in a timely fashion was the result of excusable neglect. *See Davidson* v. *Kernan*, 740 F.2d 129 (2d

Cir. 1984) (plaintiffs requested extension to respond to defendants' dismissal motion not result of excusable neglect since plaintiffs failed to request extension before hearing date when it became apparent they could not timely respond).

Moreover, the Court notes that most of plaintiff's arguments were previously made and ruled upon in the Court's opinion of November 23, 1988. New matters raised by plaintiff simply fail to state a palpable defect. Accordingly, the Court will not reconsider the Order of November 23, 1988.

II.

DETERMINATION OF THE SANCTION

Defendants submit the cost in defending this lawsuit totals $22,600.45. Defendants admit, however, they are not entitled to this full amount. The district court only granted sanctions for the cost of defense for defendants Michel and Kernen. Defendants suggest that since the amount represents the cost of defense for three defendants, an award of two-thirds of the total attorney fees is reasonable.

This Court disagrees.

Defendants Michel and Kernen are the majority shareholders, officers and operators of Midwest, a close corporation. Regardless of whether Michel and Kernen were joined as individuals, Midwest would have incurred the vast majority of fees generated by this litigation. In addition, Michels and Kernen would have been subject to discovery inquiries on behalf of their corporation.

Rule 11 is designed to deter the filing of frivolous pleadings. Rule 11 should not, however, provide a windfall to the beneficiary of a sanction award.

The amount of a sanction is left to the discretion of the trial judge. In determining the amount of sanction to be imposed, the Court has extensively reviewed the Court file. While some discovery requests are specific to the individual defendants, a vast majority of the pleadings generated and issues raised were relevant and necessary for the claims against Midwest. With this in mind, the Court awards defendants Michel and Kernen $2,260.00, that amount being 10% of the total fees submitted on behalf of the defendants Michel, Kernen and Midwest.

In arriving at this amount, the Court finds defendants will not be awarded a windfall, yet, at the same time, the deterrent purpose of Rule 11 is satisfied.

III.

WHETHER THE MAGISTRATE'S DISCOVERY SANCTION SHOULD BE REVIEWED

A magistrate may hear and determine any discovery matter pending before the district court. A district court may reconsider a magistrate's order on appeal only if the appeal is filed within ten days of entry of the magistrate's order and the district court finds the magistrate's order to be clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A). In this case, plaintiff timely sought and received an extension until February 15, 1989, to file his brief in support of his appeal of the magistrate's order.

On February 15, 1989, plaintiff filed a 16-page brief with motion entitled:

> EMERGENCY MOTION
>
> MOTION TO STAY DEFENDANTS' PETITION FOR FEES AND ITS BRIEFING SCHEDULE, AND MOTION FOR RULING ON PLAINTIFF'S MOTION FOR RECONSIDERATION OF SANCTIONS.

Plaintiff failed to state why this matter was an emergency. No brief in support of plaintiff's appeal of the magistrate's discovery sanction was timely filed.

On February 21, 1989, plaintiff filed a motion for a second extension of time for filing a brief in support of his appeal from the magistrate's discovery sanction. Plaintiff's proof of service indicates the motion for extension was mailed on February 16, 1989. Accepting the date of mailing as the date of filing, plaintiff's request was nonetheless untimely.

As previously stated at page 4 of this opinion, when a request for an extension is made after the expiration of time prescribed for timely filing, any extension may only be granted pursuant to Rule 6(b)(2). Rule 6(b)(2) provides for an extension of time only where plaintiff's untimely request is due to excusable neglect. Plaintiff submits he could not file his appeal due to the need for a transcript of the hearing held before the magistrate.

Plaintiff's explanation fails to demonstrate why his request for an extension could not have been made in a timely fashion. Moreover, a transcript was not needed for plaintiff to satisfy the provisions of 28 U.S.C. § 636(b)(1)(A), which states:

> [Appellant] shall file with the Court, and serve on the Magistrate and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto.

Rather than researching, writing and filing the emergency motion to stay filed February 15, 1989, plaintiff could and should have filed his brief in support of his appeal from the magistrate's discovery sanction. The filing of the emergency motion and the request for a second extension for filing his appeal from the dis-

covery sanction simply support Magistrate Pepe's finding that plaintiff has the capacity and willingness to argue and litigate at great length the smallest of items.

Accordingly, this Court denies plaintiff's motion for a second extension of time in which to file his brief in support of appeal for the discovery sanction. The discovery sanction shall be enforced.

CONCLUSION

For the reasons stated herein, plaintiff is assessed a Rule 11 sanction in the amount of $2,260 pursuant to the Court's Memorandum Opinion and Order dated November 23, 1988. The magistrate's sanction against plaintiff in the amount of $2,230 is AFFIRMED. Plaintiff shall tender payment of these sanctions to the attorney for defendants Michel, Kernen and Midwest within 45 days of entry of this Order.

IT IS SO ORDERED.

/s/ LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

(Pursuant to Rule 77(d), FRCivP COPIES HAVE BEEN MAILED TO THE FOLLOWING: Joseph A. Longo, Atty. Morris D. Lefkowitz, Atty. James J. Walsh on June 21, 1989.)